IN THE HIGH COURT OF JUDICATURE AT BOMBAY
APPELLATE SIDE JURISDICTION

CRIMINAL APPEAL NO.177 OF 1997

(1) Sushila Nehru Shirke

(2) Pushpa Shivaji Shirke
Both aged 27 and 24 years, respectively, Occu: household, residing at Nimgaon-Mahalungi, Taluka Shirur, District-Pune ...Appellants.

V/s

The State of Maharashtra ...Respondent.

Shri B.R. Patil, advocate with Shri B.S. Kate, advocate for the appellants.

Mr. B.H. Mehta, APP for the State.

CORAM : V.G.PALSHIKAR & R.C.CHAVAN, JJ

DATED : 9th August, 2005

ORAL JUDGMENT : (Per R.C.Chavan, J)

1. Appellants have challenged their conviction and the resultant sentences imposed upon him by the learned Additional Sessions Judge, Pune for offences of committing house trespass by entering into the house of deceased Hirabai and murdering Hirabai, punishable under sections 451 and 302 read with section 34 of the Penal Code.

2. Appellants are wives of victim's husband's

brothers. Appellants and the victim had a quarrel on account of some agricultural operations. On the morning of 03/01/1994, appellants came to the house of victim. Appellant - Pushpa beat her up and appellant - Sushila poured kerosene on her person from a container in victim's own house and set her on fire.

3. Victim was taken to the Sasoon Hospital at Pune. Police were informed and they arranged for recording dying declaration of the victim before the Special Judicial Magistrate. Police registered the offence. Victim succumbed to her injuries in the evening of 04/01/1994. After performing inquest, her body was sent for post-mortem examination. The Medical Officer found that the victim had suffered 65% burns and died as a result of those burn injuries.

4. In the course of investigation, police recorded statements of witnesses, seized incriminating articles, sent the articles to the Forensic Science Laboratory and, on completion of investigation, sent the charge-sheet to the learned Judicial Magistrate, First Class, Shirur, who committed the case to the Court of Sessions.

5. The learned Additional Sessions Judge, Pune to whom the case was assigned, charged the appellants of

offences punishable under section 451 and 302 read with section 34of the Indian Penal Code. Appellants pleaded not guilty and hence were put on trial. Prosecution examined in all 13 witnesses in its attempt to prove guilt of the accused. Upon consideration of prosecution evidence, in light of defence raised, the learned Additional Sessions Judge held the charges as proved and sentenced both the appellants to imprisonment for life and fine of Rs 1,000/- each for an offence punishable under section 302 read with section 34 of the Penal Code and rigorous imprisonment for two months and fine of Rs 100/- each for an offence punishable under section 451 read with section 34 of the Penal code. Aggrieved thereby, the appellants have preferred this appeal.

6. We have heard the learned counsel for the appellants as well as the learned Additional Public Prosecutor for the State. We have gone through the entire evidence and reappraised it with the help of both the learned counsel. Prosecution has relied on eye witness account of P.W. 9 - Santosh Shirke who claimed to have seen both the appellants, setting his mother on fire and disclosures made by the victim to her relations as well as to authorities, indicating complicity of the accused. There are no other circumstances which could connect the appellants to

the crime since the evidence of P.W. 1 - Dr. Usha Marathe shows that there were no marks of injuries or burns anywhere on the body of appellant - Sushila, whom P.W.1 - Dr Marathe examined.

7. P.W. 9 - Santosh was a 12 years old boy when he was examined in the Court. He stated that on 03/01/1994, both the appellants told the victim that onion crop was to be irrigated and, on that day, they would not do so, impliedly passing the burden of irrigating the crop to the victim. The witness then curiously states that his mother told the appellants that she would water the crop which the appellants opposed, resulting in a quarrel. It is not clear as to what the appellants had in mind. If the appellants came to state that they were not going to irrigate crop that day, obviously, they intended the victim to do so. When victim agreed, in fact, there should have been no quarrel. Therefore, account of P.W. 9 Santosh in respect of the quarrel appears doubtful. P.W. 9 - Santosh admitted in his cross-examination that he was staying with his maternal uncle at Kothrud, Pune. When he was interrogated by the Police, his maternal uncle was present with him. The possibility of this child being influenced by his maternal uncle in making a statement, cannot be ruled out.

8. P.W.9 - Santosh further stated that after, she was set on fire, his mother rushed out of the house, went to the backside of the house and rolled in Jowar Crop to extinguish the flames.

9. P.W. 3 - Subhash Landge stated that on 03/01/1994, at about 8 to 8.30 a.m. when he was returning from a dairy, he noticed Hirabai in flames in the rear portion of her house. He claims to have rushed towards her and extinguished the fire. He then made arrangements to have Hirabai shifted to hospital. In cross-examination, this witness stated that Hirabai told him that she had sustained burn injuries while preparing meals. Apart from this, he stated that Hirabai told him that her husband Prakash and son Santosh had gone to Talegaon, ruling out the presence of Santosh at the time of incident.

10. P.W. 8 - Kantilal Thorat, Hirabai's brother, states that the appellant Pushpa had held Hirabai and Sushila set her on fire. Similar is the version of P.W.9 - Santosh. But, curiously, in the dying declaration at Exhibit 23 recorded by the Special Judicial Magistrate, the victim did not state that Pushpa held her. This would show that P.W. 8 - Kantilal and P.W. 9 - Santosh have similar story to

tell which is different from those which come from other witnesses. It may be seen that even the learned trial judge, after considering the evidence of Santosh and other witnesses, concluded in para 32 of his judgment that the presence of Santosh on the spot at the time of incident was doubtful and, therefore, discarded the evidence of P.W.9 - Santosh.

11. This takes us to the disclosures and dying declarations made by the victim - Hirabai. P.W. 2 Prakash is Hirabai's husband. He states that on learning of the incident, he reached Sasoon Hospital, found his wife having sustained severe burn injuries, and had a talk with her. He claims that his wife told him that while preparing meals her Saree caught fire and she sustained burn injuries. It is difficult to conceive that a husband would falsely attribute such a statement to his wife just in order to save wives of his brothers. As already pointed out, P.W. 3 - Subhash who was the first person to see Hirabai in flames, states that Hirabai told him that she sustained injuries while preparing meals. P.W. 6 - Balu Pingale is another witness who claims to have extinguished the flames. He too states about presence of P.W. 3 - Subhash and P.W. 3 - Subhash too states about presence of P.W. 6 - Balu Pingale. P.w.6 - Balu also claims that Hirabai told them that while

preparing meals, her saree caught fire.

12. The whole story of the manner in which Hirabai caught fire seems to have changed after Hirabai was taken to hospital at Pune. It is worthy of note that Hirabai's brother Kantilal who was examined as P.W.8 resides at Pune itself.

13. P.W. 7 - Special Judicial Magistrate Ulhas Kornanne states that on 3/1/1994, he received requisition from police for recording dying declaration of Hirabai. Accordingly, he reached Sasoon Hospital, contacted the doctor on duty, made necessary inquiries with the patient and recorded dying declaration in which Hirabai stated that the appellants had set her on fire. Shri Kornanne (P.W.7) obtained requisite endorsement of the Medical Officer.

14. Similar statement was recorded by P.W. 10 Head Constable Sardar Kothali. However, in the statement recorded by Sardar, the victim allegedly told that after she raised cries, her brothers-in-law Nehru and Shivaji i.e. husband of the two appellants extinguished the flames and took her to hospital. Nehru and Shivaji have not been examined, presumably because they are husbands of the appellants.

15. It may be seen that there are three disclosures to P.W. 3 - Subhash, P.W. 6 - Balu and victim's husband P.W.2 - Prakash Shirke where Hirabai had stated that she had sustained burn injuries while cooking meals. It is not shown that any of these witnesses has any reason to come out with a false story. It is not shown that these witnesses had taken some different stand before the police in course of investigation and have departed from their earlier stand in the course of trial. Therefore, evidence of all these three witnesses raises the possibility that the victim did, indeed, suffer burns while cooking meals and that story implicating the appellants was evolved after the victim was shifted to Sasoon Hospital at Pune.

16. In view of this, we hold that the evidence about dying declaration recorded by P.W. 7 - Special Judicial Magistrate Koranne or disclosures made to P.W.8 - Kantilal or P.W.10 - Head Constable Kothali, if not outweighed, are atleast evenly balanced by disclosure made by victim to P.W. 2 - Prakash, P.W. 3 - Subhash and P.W. 6 - Balu. Consequently, in our opinion, the learned Additional Sessions Judge ought to have extended the benefit of doubt to the appellants. We, therefore, hold that the learned

Additional Sessions Judge erred in convicting the appellants of offences punishable under sections 451 and 302 read with section 34 of the Penal Code and inflicting sentences upon the appellants.

17. Consequently, we allow the appeal, set aside the conviction and sentence of the appellants for offences punishable under sections 451 and 302 read with section 34 of the Penal Code. Bail bonds, if any, furnished by the appellants shall stand cancelled.

Fine, if paid, be refunded to the appellants.

(V.G. PALSHIKAR, J.)

(R.C. CHAVAN, J.)